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Nos. 87-1589 and 87-1888

In the Supreme Court of the United States

OCTOBER TERM, 1988

PITTSBURGH & LAKE ERIE RAILROAD COMPANY, PETITIONER

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission's authorization of a rail line acquisition by a non-carrier: (a) relieves the selling railroad of any obligation to bargain with its employees in accordance with the Railway Labor Act concerning the sale; and (b) relieves the courts of the provisions of the Norris-LaGuardia Act prohibiting injunctions in cases involving labor disputes.

2. Whether the Railway Labor Act requires a railroad to postpone a sale of its rail lines to a non-carrier until the railroad has completed bargaining with its unions concerning the unions' proposed changes in the existing collective bargaining agreements that would address the effects of that sale.

3. Whether a court order requiring a railroad to continue its operations while it is bargaining under the Railway Labor Act violates the Fifth Amendment's prohibition against the taking of property without just compensation.

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INTEREST OF THE UNITED STATES

This case concerns the application of the Interstate Commerce Act (ICA), 49 U.S.C. 10101 *et seq.*, the Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.*, and the Norris-LaGuardia Act (NLGA), 29 U.S.C. 101 *et seq.*, to a railroad's dispute with its labor unions over the railroad's proposed sale of its rail assets. The United States has an interest in such disputes as a result of the regulatory and mediational responsibilities of its various agencies, including the Interstate Commerce Commission, the Federal Railroad Administration, and the National Mediation Board.[1]

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[1] The Solicitor General filed a brief amicus curiae in this case at the petition stage in response to the Court's order inviting him to express the views of the United States. The Solicitor General has not authorized any federal agency to file a brief in this case on its own behalf.

STATEMENT

The Pittsburgh & Lake Erie Railroad Company (P&LE) filed separate petitions for writs of certiorari to review two related court of appeals decisions arising from P&LE's dispute with its labor unions over the railroad's proposed sale of its rail assets. The first petition, No. 87-1589, requested review of a court of appeals' decision holding that Section 4 of the NLGA, 29 U.S.C. 104, prohibits the courts from enjoining a labor strike arising from the railroad's sale of its rail lines to another company in a transaction authorized by the Interstate Commerce Commission (ICC) pursuant to the ICA. The second petition, No. 87-1888, requested review of a subsequent decision by the same court of appeals holding that P&LE must first bargain with its unions over the effects of the railroad's proposed sale of its rail lines pursuant to the provisions of the RLA, 45 U.S.C. 151 *et seq.*, before completing the sale. This Court granted the petitions and consolidated them in the instant proceeding.

A. The Relevant Statutes

1. The ICA establishes a national transportation policy to promote efficient, competitive carriage of goods and persons (49 U.S.C. 10101, 10101a) and creates the ICC to implement that policy (49 U.S.C. 10301 *et seq.*). The ICA grants the ICC broad jurisdiction over various forms of transportation, including rail carriage (49 U.S.C. 10501), and gives the ICC power to exempt carriers from ICA regulation (49 U.S.C. 10505). The ICA specifically regulates, *inter alia*, the construction and operation (49 U.S.C. 10901) or abandonment (49 U.S.C. 10903) of rail lines and the combination (including consolidation, merger and acquisition of control) of rail carriers (49 U.S.C. 11341 *et seq.*).

The ICA, in its present form, reflects a number of amendments enacted in 1980 to revitalize the railroad industry by reducing or eliminating regulatory burdens. See Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895. The ICC has responded to these amendments and the newly revised national

rail transportation policy (49 U.S.C. 10101a) in various ways.[2] Of particular relevance here, the ICC has encouraged the nation's railroads to sell, rather than to abandon, less profitable regional rail lines. The ICC has recognized that sale of these rail lines in lieu of abandonment frequently provides business opportunities for new, smaller, and more efficient carriers while preserving local rail service and related employment opportunities. The ICC has assisted the trend toward sale rather than abandonment of rail lines by supplementing the Section 10901 procedures governing approval of rail line acquisitions with a streamlined process—the *Ex Parte No. 392* class exemption—for prompt regulatory authorization of those transactions. See *Ex Parte No. 392 (Sub-No. 1), Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985), review denied mem. *sub. nom. Illinois Commerce Comm'n* v. *ICC*, 817 F.2d 145 (D.C. Cir. 1987).[3]

The ICC has the power to condition its approval of Section 10901 acquisitions on the provision of measures to protect affected rail employees (49 U.S.C. 10901(c)(1)(A)(ii), (e)). See *ICC* v. *Railway Labor Executives' Ass'n*, 315 U.S. 373 (1942); *United States* v. *Lowden*, 308 U.S. 225 (1939); see also 49 U.S.C. 10101a(12). Since the passage of the Staggers Act, the ICC generally has declined to provide such protection on the

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[2] For the convenience of the Court, we have reprinted the 15-point national rail transportation policy as an addendum to this brief. See Add., *infra*, 1a-2a.

[3] The ICA generally provides that a party may acquire a rail line only if the party first obtains ICC approval. See 49 U.S.C. 10901. However, the ICC is empowered to exempt a person, class of persons, or transaction from the Section 10901 approval process if it finds that ICC oversight is "not necessary to carry out" the national rail transportation policy and the transaction or service is of "limited scope" or the application of the relevant statutory provisions is "not needed to protect shippers from the abuse of market power" (49 U.S.C. 10505(a)). After the passage of the Staggers Act, the ICC regularly (and generally without opposition) exempted individual acquiring entities from the Section 10901 approval process. In 1985, the ICC codified existing practice by establishing a blanket exemption for Section 10901 acquisitions by "non-carriers" (*i.e.*, new entrants into the railroad business), the so-called *Ex Parte No. 392* exemption. See 1 I.C.C.2d 810-811.

ground that it would effectively foreclose the formation of new rail carriers and would ultimately lead to further loss of jobs through the abandonment and dismantling of marginal rail lines. See 87-1888 Pet. App. 110a-111a. In issuing *Ex Parte No. 392,* the ICC indicated that rail labor could file a petition under 49 U.S.C. 10505(d) to revoke a particular line acquisition's exemption from the Section 10901 approval process if it demonstrated that "exceptional" circumstances justified labor protection in the transaction. 1 I.C.C.2d at 815.

2. The RLA is designed to avoid and resolve disputes between rail or airline management and labor that may lead to "impairment or interruption of interstate commerce * * *." H.R. Rep. No. 328, 69th Cong., 1st Sess. 1 (1926). In order "[t]o avoid any interruption to commerce or to the operation of any carrier engaged therein" (45 U.S.C. 151a), the Act imposes a duty on "all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise" (45 U.S.C. 152 First). The Act further provides distinct procedures for resolving so-called "major" and "minor" disputes.

Major disputes involve "the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy." *Elgin, J. & E.R.R.* v. *Burley,* 325 U.S. 711, 723 (1945), aff'd on reh'g, 327 U.S. 661 (1946). Because major disputes "present the large issues about which strikes ordinarily arise" and "because they seek to create rather than to enforce contractual rights, they have been left for settlement entirely to the processes of noncompulsory adjustment" (325 U.S. at 723-724). Where such a dispute is involved, the parties must preserve "rates of pay, rules, [and] working conditions" (45 U.S.C. 156) while they engage in a lengthy process of negotiation, mediation, and possibly review by a Presidential Emergency Board. See *Detroit & T.S.L.R.R.* v. *United Transp. Union,* 396 U.S. 142 (1969). If that process fails to produce an agreement, however, each side is free to resort to strikes (including secondary picketing), lock-outs, or other forms of economic self-help calculated to achieve the desired objectives. See 45 U.S.C. 152 Second and Seventh, 155 First, 156, 157, 160; *Burlington N.R.R.* v. *Brotherhood of Maintenance of Way Employes,* 481 U.S. 429, 444, n.10 (1987); *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.,* 394 U.S. 369, 378 (1969).

By contrast, minor disputes involve "the meaning or proper application" of a particular collective bargaining agreement, or they may relate to the so-called "omitted case," in which a dispute "is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement" (*Elgin,* 325 U.S. at 723).[4] "Minor disputes initially must be dealt with through a railroad's internal dispute resolution processes." *Atchison T. & S.F.R.R.* v. *Buell,* 480 U.S. 557, 563 (1987). Unlike a major dispute, if a minor dispute is not settled through initial discussions, it may be "referred by petition of the parties or by either party" to one of a number of grievance "adjustment boards" including the National Railroad Adjustment Board (NRAB). 45 U.S.C. 153 First (i), Second. In such circumstances, the adjustment board's arbitration is compulsory (45 U.S.C. 153 First (i), Second), its decision is binding on the parties (45 U.S.C. 153 First (m), Second), and judicial review is narrowly limited to whether the board exceeded its jurisdiction, failed to comply with the RLA's specific statutory requirements, or was influenced by fraud or corruption (45 U.S.C. 153 First (q), Second). See *Union Pac. R.R.* v. *Sheehan,* 439 U.S. 89, 93 (1978) (per curiam).

3. The NLGA " 'expresses a basic policy against the injunction of activities of labor unions.' " *Burlington N.R.R.,* 481 U.S. at 437 (quoting *Machinists* v. *Street,* 367 U.S. 740, 772 (1961)). Section 1 states that "[n]o court of the United States

[4] As the Fifth Circuit has explained, the question "whether a dispute is major or minor has absolutely nothing to do with how important a dispute is. The sole question is whether the proposed change has a basis in the contract." *International Brotherhood of Teamsters* v. *Southwest Airlines Co.,* 842 F.2d 794, 803 (5th Cir. 1988).

* * * shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter." 29 U.S.C. 101. Section 4(a) lists specific acts that shall not be subject to injunction, including: "Ceasing or refusing to perform any work or to remain in any relation of employment" (29 U.S.C. 104(a)).

The NLGA was enacted in response to federal court decisions that, in Congress's view, gave an overly narrow interpretation to Section 20 of the Clayton Act, 29 U.S.C. 52, which prohibits injunction of various labor activities. See *Burlington N.R.R.*, 481 U.S. at 437-439; *United States* v. *Hutcheson,* 312 U.S. 219, 235-236 (1941). This Court has interpreted the NLGA in light of its historical purpose while accommodating the NLGA's broad prohibition against federal court injunctions of labor strikes with the terms and objectives of other statutes that address labor relations. See *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235, 250-252 (1970) (Labor Management Relations Act); *Brotherhood of R.R. Trainmen* v. *Chicago River & I.R.R.*, 353 U.S. 30, 41 (1957) (RLA).

B. The Present Dispute

1. P&LE is a small railroad that owns and operates 182 miles of rail line in western Pennsylvania and eastern Ohio. P&LE has experienced financial difficulties and, on July 8, 1987, it entered into an agreement to sell its rail lines to P&LE Railco, Inc. (Railco), a newly formed company that intended to operate those lines with a reduced contingent of employees. Railco's acquisition of P&LE's rail lines was subject to the ICC's approval in accordance with the ICA. See 87-1589 Pet. App. A2-A3; 87-1888 Pet. App. 11a-13a.

When informed of the proposed sale, P&LE's unions requested the railroad to serve notices under Section 6 of the RLA, 45 U.S.C. 156, and to commence collective bargaining with the unions over the effects on labor of its decision to discontinue its railroad business. P&LE responded that it had no duty to bargain under the circumstances. The unions then

served Section 6 notices proposing changes to their collective bargaining agreements to give the employees greater protection in the event of a sale. See 45 U.S.C. 156. The Railway Labor Executives' Association (RLEA), on behalf of P&LE's unions, thereafter brought an action in the United States District Court for the Western District of Pennsylvania to enjoin the sale and to force P&LE to bargain. On September 15, 1987, the unions commenced a general strike of the P&LE. See 87-1589 Pet. App. A3-A4; 87-1888 Pet. App. 11a-14a.

On September 19, 1987, Railco filed a "notice of exemption" with the ICC seeking exemption from the ICA approval process under the ICC's *Ex Parte No. 392* "non-carrier" exemption regulations. See pages 3-4, *supra.* Under *Ex Parte No. 392,* an exemption becomes effective and the transaction may be carried out seven days after the filing of a notice by the acquiring entity unless a petition to revoke the exemption has been filed and granted or the transaction is stayed by the ICC. See 49 C.F.R. Pt. 1150.[5] On September 25, 1987, the ICC denied RLEA's request for a stay, and on October 2, 1987, RLEA filed a petition to revoke Railco's exemption, which remains pending before the agency. See 87-1589 Pet. App. A4; 87-1888 Pet. App. 10a-14a.

Meanwhile, P&LE requested the district court to enjoin the RLEA general strike on the ground that the work stoppage was an illegal attempt to interfere with the ICC's exclusive jurisdiction over Railco's purchase of the rail line. The court ultimately agreed and issued an injunction. See 87-1589 Pet. App. B1-B10. RLEA appealed, and the court of appeals summarily reversed the district court's decision. See *id.* at A1-A13 (*P&LE I*). The court held that Section 4 of the NLGA, 29 U.S.C. 104, deprived the district court of jurisdiction to issue the injunction, rejecting P&LE's contention that the NLGA must be accommodated to the ICA, and remanded the case for a determination whether P&LE was obligated to comply with the RLA bargain-

[5] On February 29, 1988, the ICC modified the *Ex Parte No. 392* exemption procedures to extend the notice periods and delay the effective date of the exemptions involving line sale transactions that result in the creation of larger railroads. 53 Fed. Reg. 5,981.

ing procedures. P&LE then petitioned this Court, in No. 87-1589, for a writ of certiorari to review that decision.

2. On remand, the district court held that P&LE was obligated to bargain under the RLA concerning the effects of the proposed sale on its employees and enjoined the sale "to the extent that such sale does not include provisions for the maintenance of the status quo" (87-1888 Pet. App. 71a-85a). P&LE appealed, and the court of appeals affirmed the district court's decision. See *id.* at 1a-70a (*P&LE II*). The court of appeals concluded that the RLA required P&LE to bargain with its unions over the effects on labor of the railroad's proposed sale of assets and that the RLA's "status quo" provisions prohibited P&LE from completing the sale and eliminating any workers' employment during the bargaining process (*id.* at 16a-26a). The court rejected the contention that the ICC's exemption of P&LE's proposed sale from the requirements of the ICA relieved the railroad of its bargaining obligations (*id.* at 26a-57a). Judge Hutchinson dissented, concluding that "the RLA and the ICA are inherently contradictory in this respect and that Congress intended the ICA to prevail" (*id.* at 61a). P&LE petitioned this Court, in No. 87-1888, for a writ of certiorari to review the court of appeals' decision.[6]

SUMMARY OF ARGUMENT

The court of appeals correctly concluded that the ICA does not implicitly repeal the RLA collective bargaining provisions that otherwise would be applicable to this transaction. The ICA empowers the ICC to approve an acquiring entity's proposed

[6] The court of appeals recently entered yet another decision arising from the RLEA's objections to P&LE's proposed sale of its rail assets. See *Railway Labor Executives Ass'n* v. *Pittsburgh & Lake Erie R.R.*, 858 F.2d 936 (3d Cir. 1988) (*P&LE III*). RLEA had brought a state court action seeking to enjoin P&LE's sale on the ground that it violated the Pennsylvania Fraudulent Conveyance Act, Pa. Stat. Ann. tit. 39, §§ 351-363 (Purdon 1954), and P&LE removed the action to federal court. The court of appeals held that removal was improper and instructed the district court to remand the case to the state court.

acquisition of a rail line, and it empowers the ICC, in its discretion, to impose labor protective conditions as a part of its approval. 49 U.S.C. 10901. The RLA, by contrast, governs the resolution of labor disputes arising from the formation, change, or interpretation of collective bargaining agreements. While there is some tension between the ICA and the RLA, the relevant provisions can stand together. They do not exhibit the sort of irreconcilable conflict that normally must be present to support an implicit repeal. It follows that if the ICA does not implicitly relieve the selling railroad of its RLA obligations in this situation, it cannot nullify the NLGA's anti-injunction provisions and allow a court to enjoin a labor strike brought in response to the railroad's failure to comply with the RLA.

The court of appeals was also correct in holding that the RLA imposes a duty on the railroad to bargain over the effects of its decision to go out of the railroad business. This duty, however, must be read in light of the railroad's right to exercise its basic managerial prerogatives. While the railroad is obligated to confer on employee proposals concerning the effects of the business closure, it is under no obligation to bargain over proposals that would prevent it from effectuating its decision to close. Likewise, the railroad's duty to bargain over effects generally should end once the railroad has fulfilled its existing contractual obligations and has discontinued its operations.

While the court of appeals was correct in concluding that the RLA requires a railroad to engage in effects bargaining, the court erred in interpreting the RLA's status quo obligations. The railroad is not obligated to preserve jobs during the bargaining process, it is obligated to preserve "rates of pay, rules, [and] working conditions" (45 U.S.C. 156). The railroad is therefore entitled to take actions during the bargaining process that affect its employees, provided that those actions are authorized either under the existing collective bargaining agreement or through the implicit understanding of the parties as reflected in established work practices. This result is not only consistent with the RLA's language, it furthers the RLA's objective of encouraging the formation of agreements that specify in

advance the rights of management and labor in the face of future contingencies. Such agreements would be pointless if, once the contingency occurred, either party could suspend the agreement by simply proposing to amend the accord.

P&LE's claim that the court of appeals' status quo requirements amount to an "erosive" taking (which apparently was first raised in the court of appeals) is not supported by a factual record and, accordingly, cannot be resolved in this proceeding. In any event, our construction of the RLA status quo obligation eliminates any prospect of a Fifth Amendment violation. The railroad can suffer no erosive taking if its obligation to remain in business results from consensual commitments set forth in its collective bargaining agreements or arises from its implicit understandings with its employees.

ARGUMENT

I. The ICC'S Authorization Of A New Carrier's Acquisition Of P&LE'S Rail Assets Did Not Exempt P&LE From The Provisions Of The Railway Labor Act And The Norris-LaGuardia Act

P&LE urges that the ICC's authorization of a non-carrier's acquisition of existing rail lines relieves the selling railroad of any RLA obligation to bargain with its employees concerning the sale and relieves the courts of the provisions of the NLGA prohibiting injunctions in cases involving labor disputes. P&LE's arguments are not without force, but they ultimately are unpersuasive.

Congress's scheme for regulating rail line acquisitions does create some tension between the ICA and the RLA. Congress has given the ICC broad authority, through Section 10901 of the ICA, to approve or disapprove rail line acquisitions and to impose conditions on the transactions designed to ameliorate the transaction's impact on rail labor. 49 U.S.C. 10901. But Congress has also provided a general framework, through the RLA's "major" dispute provisions, for making changes to existing collective bargaining agreements. Congress has given no express guidance on how the ICC's exercise (or withholding) of its discretionary power to impose labor protection affects the otherwise applicable RLA mechanisms for resolving labor-management disputes. Faced with this silence, P&LE essentially argues that the ICA repeals by implication any otherwise applicable provisions of the RLA that would block implementation of the ICC-approved transaction. See 87-1589 Pet. 15-16, 22; 87-1888 Pet. 16.

This Court has repeatedly recognized that repeals by implication are not favored. *E.g.*, *United States* v. *Fausto*, No. 86-595 (Jan. 25, 1988), slip op. 13; *Watt* v. *Alaska*, 451 U.S. 259, 267 (1981); *Morton* v. *Mancari*, 417 U.S. 535, 549 (1974). One federal law should not be held to repeal another unless there is an "intolerable conflict between the two statutes." *Atchison T. & S.F. R.R.*, 480 U.S. at 566-567.[7] In our view, the present case does not meet that threshold.

The pertinent ICA section involved here—Section 10901—does not provide any affirmative textual basis for superceding otherwise applicable labor law. Section 10901(a) states that a rail carrier providing transportation subject to the jurisdiction of the ICC may construct or acquire a rail line "only if the Commission finds that the present or future public convenience and necessity require or permit the construction or acquisition (or both) and operation of the railroad line." 49 U.S.C. 10901(a). The ICC evaluates the public convenience and necessity in light of the 15 policy concerns identified in the ICA's national rail transportation policy, 49 U.S.C. 10101a. See Add., *infra*, 1a-2a. It approves a proposed acquisition through the issuance of a certificate of public convenience and necessity, which may "require compliance with conditions the Commission finds necessary in the public interest" (49 U.S.C. 10901(c)).

[7] The conflict generally must be "irreconcilable." See, *e.g.*, *Watt*, 451 U.S. at 266; *Morton*, 417 U.S. at 550; *FTC* v. *A.P.W. Paper Co.*, 328 U.S. 193, 202 (1946); *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936). As the Court has explained, "We must read the statutes to give effect to each if we can do so while preserving their sense and purpose." *Watt*, 451 U.S. at 267. Accord, *Morton*, 417 U.S. at 551; *Haggar Co.* v. *Helvering*, 308 U.S. 389, 394 (1940); *United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939); *Wood* v. *United States*, 41 U.S. (16 Pet.) 342, 362-363 (1842).

The ICC may condition its approval of a proposed Section 10901 acquisition on the acquiring entity's satisfaction of reasonable public interest requirements, including labor protection conditions, derived from the national rail transportation policy. See *ICC* v. *Railway Labor Executives' Ass'n,* 315 U.S. 373 (1942); *United States* v. *Lowden,* 308 U.S. 225 (1939); see also 49 U.S.C. 10101a(12). But this does not mean that the ICC can exercise its permissive authority to remove other potential legal obstacles to the transaction. Congress has authorized the ICC to approve or disapprove Section 10901 acquisitions on the basis of specific statutory criteria set forth in Section 10101a; it has not given the agency any express powers to compel the consummation of those privately negotiated transactions or to insulate a contracting party—in this case the selling railroad—from legal or economic hindrances, such as the RLA, that may render an acquisition impractical or less desirable. Cf. *St. Joe Paper Co.* v. *Atlantic Coast Line R.R.,* 347 U.S. 298 (1954).[8]

[8] Section 10901(d) does allow a carrier to construct a rail line across the property of another carrier subject to the conditions of reasonable use and compensation. 49 U.S.C. 10901(d). Furthermore, Section 10901(e) provides that the ICC "may require any rail carrier proposing both to construct and operate a new railroad line pursuant to this section to provide a fair and equitable arrangement for the protection of the interests of railroad employees who may be affected thereby * * *." 49 U.S.C. 10901(e). But these provisions, which deal with the construction of new rail lines, obviously have no application to the present situation, which involves the acquisition of an existing rail line. Indeed, the former provision indicates, if anything, that when Congress wishes to relieve a railroad of an obstacle to consummation of a transaction, it does so expressly. And the latter provision, which gives the ICC discretion to impose labor-protective conditions, does not expressly displace a railroad employee's preexisting collective bargaining rights.

We note that when Congress passed the Staggers Act, it provided for additional mandatory or discretionary labor protection with respect to various transactions. However, Congress declined to impose mandatory labor protection in the case of Section 10901 transactions. See H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 115-116 (1980). We do not believe that Congress's action there, or in other instances involving the extension of labor protection, provides any concrete guidance, one way or the other, concerning Section 10901's preemptive effect. The history of congressionally-imposed rail labor protection prior to the passage of the Staggers Act is summarized in H.R. Rep. No. 1035, 96th Cong., 2d Sess. 139-145 (1980).

Giving effect to both the ICA and the RLA is not only consistent with the specific ICA provision applicable in this case, it also is consistent with the general purposes and structure of the two acts.[9] We think it particularly relevant that when Congress has wished to remove legal obstacles to the consummation of various ICA transactions, it has done so expressly.[10] Given that practice, it is difficult to surmise that Congress would have curtailed the RLA's fundamental role in the resolution of labor-management disputes through the backhanded manner of implicit repeal.[11]

[9] A fair reading of ICA's terms indicates that the Section 10901 approval process and the RLA collective bargaining provisions stand as two largely separate statutory regimes that are each applicable to a proposed acquisition and that are each directed to largely separate concerns. The Section 10901 approval process assures that the acquiring party will satisfy the general public interest requirements of convenience and necessity in accordance with the national rail transportation policy. See 49 U.S.C. 10101a. The RLA collective bargaining provisions are directed, by contrast, to the more specific problem of resolving specific "disputes concerning rates of pay, rules, or working conditions" and "disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." 45 U.S.C. 151a. Thus, each statute plays a distinct role in—and imposes separate legal constraints on—the consummation of a proposed transaction.

[10] See note 8, *supra.* Elsewhere in the ICA, Congress has expressly provided that the ICC may compel a "forced sale" of lines otherwise subject to abandonment. 49 U.S.C. 10905. And Congress has expressly provided that a participant in an ICC-authorized rail merger "is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction" (49 U.S.C. 11341). See *ICC* v. *Brotherhood of Locomotive Engineers,* No. 85-792 (June 8, 1987), slip op. 9-17 (Stevens, J., concurring in the judgment). Thus, when Congress has intended for the ICA to repeal other federal laws or existing legal rights, it has generally provided expressly for that result. But see *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.,* 450 U.S. 311, 318-319 (1981) (holding that the ICA preempts by implication state attempts to regulate commerce).

[11] Implicit repeal is particularly difficult to find in this case, where the acquiring entity received ICC authorization to go forward with the purchase through an ICC class exemption granted pursuant to Section 10505 of the ICA. See pages 3-4, 7 *supra.* Section 10505(a) provides that the ICC "shall exempt a person, class of persons, or a transaction or service when the Com-

In sum, there is no satisfactory textual or contextual basis for concluding that the ICC's exercise of its Section 10901 authority must result in the implicit repeal of the RLA.[12] The Section 10901 approval process is simply *one* of the hurdles that must be cleared in the course of completing a rail line acquisition. The ICC's authorization gives an acquiring entity assurance that the transaction is consistent with the ICA, but it does not relieve the selling railroad of its RLA bargaining obligations. And it naturally follows that if Section 10901 does not implicitly relieve the selling railroad of its RLA obligations, it cannot nullify the NLGA's anti-injunction provisions and allow a court to enjoin a labor strike brought in response to the railroad's failure to comply with the RLA. See U.S. Pet. Amicus Br. 17-18.[13]

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mission finds that the application of a provision of this subtitle (1) is not necessary to carry out the transportation policy of section 10101a of this title; and (2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power." 49 U.S.C. 10505(a). The ICC's grant of the class exemption accordingly represents its determination that application of the relevant ICA provisions in that class of cases is not necessary to carry out the national rail transportation policy. If the ICA provisions are not applicable, it is difficult to see how there would be an "irreconcilable conflict" between the ICA and the RLA.

[12] This is not a case, such as *Fausto, supra,* where a fair reading of a statute results in the "repeal by implication of a legal disposition *implied* by a [different] statutory text" (*id.* at slip op. 13 (emphasis added). The position that P&LE advocates would result in Section 10901 precluding the application of the RLA's express terms, *in toto,* in the case of the pertinent transaction. As this Court explained, "it can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change" (*ibid.*).

[13] The ICC believes that its authorization of the acquisition here relieves the selling railroad of any otherwise applicable RLA collective bargaining obligations. See U.S. Pet. Amicus Br. 8 & n.7. We have concluded that the ICC's view (as well as its intervention below (see *id.* at 6 n.5)) is based on an incorrect interpretation of its statutory authority. Cf. *Board of Governors* v. *Dimension Fin. Corp.*, 474 U.S. 361 (1986).

II. The Railway Labor Act Does Not Automatically Require P&LE to Postpone The Sale Of Its Rail Lines Until It Has Completed Bargaining With Its Unions Concerning The Union's Proposed Changes In Existing Collective Agreements

P&LE also challenges the court of appeals' determination that the RLA requires the railroad to bargain with its unions over the effects of its proposed transaction and that the RLA's status quo provisions prohibit consummation of the transaction during the bargaining process. Those questions, which are not dispositively answered by this Court's past decisions, involve matters of fundamental importance to labor-management relations in the railroad and airline industry.

The RLA establishes an elaborate mechanism designed to encourage the peaceful resolution of labor disputes likely to disrupt interstate commerce. Section 2 First imposes a basic duty on carriers and their employees "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise" in order to avoid interruption to commerce or to carrier operations. 45 U.S.C. 152 First. In the case of "major" disputes (see page 4, *supra*), Section 2 Seventh further provides that no carrier "shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in [Section 6 of the RLA]." 45 U.S.C. 152 Seventh.

Section 6 of the RLA provides that carriers and employee representatives must "give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions" and must promptly agree to the time and place for the beginning of conferences to bargain over the proposed changes. 45 U.S.C. 156. The parties may invoke the services of the National Mediation Board to assist in resolving their differences. 45 U.S.C. 155. Once "such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its serv-

ices, rates of pay, rules, or working conditions shall not be altered by the carrier" (45 U.S.C. 156) until the negotiation, mediation, and cooling-off periods (including that associated with a Presidential Emergency Board, if one has been established) have expired. 45 U.S.C. 155, 156, 160. See, *e.g.*, *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969).

The question in this case is how the RLA's bargaining and status quo obligations apply when a railroad proposes to undertake a sale of assets that, in turn, will lead to a reduction in its labor force. The court of appeals rejected P&LE's argument that the RLA imposes no bargaining obligations at all when—as here—the sale of assets amounts to a decision to go out of business (87-1888 Pet. App. 16a-26a). The court of appeals acknowledged that P&LE is under no obligation to bargain with its unions over its actual decision to sell the assets; the RLA obligates a carrier to bargain, at most, over the *effects* of its decision on rail labor (*id.* at 16a, 24a).[14] Nevertheless, the court of appeals concluded that Section 6's command that a carrier shall not alter "rates of pay, rules, or working conditions" during the bargaining process prevents P&LE from taking actions to complete the sale and reassign or discharge employees, even if such actions are permissible under the existing collective bargaining agreements (*id.* at 17a-18a, 25a-26a).

In support of its contention that it is not obligated to bargain with its employees concerning either its decision to exit from the railroad business or the effect of that decision on its employees, P&LE relies (87-1888 Pet. 17) on this Court's decision in *Textile Workers Union* v. *Darlington Mfg. Co.*, 380 U.S. 263 (1965). In *Darlington*, a case decided under the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, this Court held that when "an employer closes his entire business, even if the liquidation is motivated by vindictiveness toward the union, such action is not an unfair labor practice" (380 U.S. at 274). P&LE urges that the

[14] "The dispute in this case is not about the decision to sell the P&LE's rail lines; it is about the effects of that decision on the employees of the railroad" (87-1888 Pet. App. 16 (footnote omitted)).

principle recognized in *Darlington*, that the NLRA " 'does not compel one to become or remain an employer' " (*id.* at 271), applies in the present context, and should relieve the railroad of its RLA bargaining obligations.

We think it clear that the basic policies underlying *Darlington* should translate with equal force in the railway and airline labor context.[15] The RLA, like the NLRA, should not be read to compel one to become or remain an employer or an employee. See *Darlington*, 380 U.S. at 268, 271. Both persons should be entitled to " 'withdraw from that status with immunity, so long as the obligations of any employment contract have been met.' " *Id.* at 271 (quoting *Darlington Mfg. Co.* v. *NLRB*, 325 F.2d 682, 685 (4th Cir. 1963)). The RLA, like the NLRA, nowhere manifests, or even suggests, the "startling innovation" (380 U.S. at 270) that an employer cannot terminate his business.[16]

It follows, again by analogy to the NLRA, that P&LE is not obligated to bargain over its actual decision to go out of business. As this Court has explained in *First Nat'l Maintenance Corp.* v. *NLRB*, 452 U.S. 666 (1981), another NLRA case, "Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business." *Id.* at 678-679. As the Court concluded in that case, "the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business

[15] We note, of course, that the NLRA "cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly, and with due regard for the many differences between the statutory schemes." *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 383 (1969).

[16] In this instance, the P&LE is not liquidating completely, but it is apparently ceasing to be a rail carrier within the meaning of the RLA. See 45 U.S.C. 151 First. Once P&LE has properly terminated that status (and fulfilled its existing contractual obligations to its employees), it is no longer subject to the RLA. A successor employer may be subject to various RLA obligations including, under certain circumstances, an obligation to bargain with the union representing its predecessor's employees. See *Fall River Dyeing & Finishing Co.* v. *NLRB*, No. 85-1208 (June 1, 1987) (NLRA decision). But this case involves P&LE's, rather than its successor's, obligations.

purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision." *Id.* at 686. Indeed, even the court of appeals concluded (and the unions apparently agreed) that P&LE is not required to bargain over its actual decision to cease operating as a railroad. See 87-1888 Pet. App. 24a. Accordingly, the scope of bargaining here can extend, at most, to the effects of P&LE's decision to terminate its railroad business.[17]

The court of appeals' conclusion that the RLA imposes a duty on the railroad to bargain about the effects of its decision to go out of the rail business is not in itself unreasonable. Section 6 of the RLA (45 U.S.C. 156), read in light of the RLA's general goal of resolving disputes through the bargaining process (45 U.S.C. 152 First), suggests that the employees may propose changes to their collective bargaining agreement that address the consequences of the railroad's closure.[18] Such proposals give rise to a

[17] Although the scope of mandatory bargaining under the RLA is "not coextensive with the National Labor Relations Act and the Board's jurisdiction over unfair labor practices" (*First Nat'l Maintenance Corp.*, 452 U.S. at 686-687 & n.23), there is no reason to depart from the NLRA's general practice in this instance. Indeed, because the ICC has statutory authority to approve any abandonment, merger, or transfer of control of a rail line (see pages 2-5, *supra*), and because the ICC has the authority to condition its approval of any such transaction by imposing appropriate labor protection measures (*ibid.*), there is, if anything, *less* reason to require a rail carrier to bargain over a decision to go out of business than there is in the NLRA context. We do not believe this Court's decision in *Railroad Telegraphers* v. *Chicago & N.W. R.R.*, 362 U.S. 330 (1960), counsels a different result. In *Telegraphers*, the question was not whether the union was entitled to bargain about the railroad's actual decision to close certain facilities; instead, it focused on the union's right to bargain about a proposed amendment to the collective bargaining agreement that would provide job security in the face of the railroad's intention to consolidate its operations. See *id.* at 332 (quoting the proposal); see also *id.* at 336 (citing the "union's effort to negotiate about the job security of its members"). *Telegraphers*, in short, involved effects bargaining.

[18] This Court recognized in *First Nat'l Maintenance Corp.* that the NLRA requires an employer to bargain about the effects of its decision to discontinue a part of its business. 452 U.S. at 677. The NLRB has maintained that the NLRA also imposes a duty to bargain about effects if the employer decides to discontinue its business completely. *Kirkwood Fabricators, Inc.* v. *NLRB*, No. 87-2110 (8th Cir. Dec. 5, 1988), slip op. 5-6 (upholding the NLRB's "long-standing position that the requirement to bargain over the effects of an employer's decision should extend to the closing and sale of a business under [NLRA] § 8(a)5"). See *Merryweather Optical Co.*, 240 N.L.R.B. 1213 (1979); *Stagg Zipper Corp.*, 222 N.L.R.B. 1249, 1251 (1976); *Interstate Tool Co.*, 177 N.L.R.B. 686, 687 (1969); *New York Mirror, Division of the Hearst Corp.*, 151 N.L.R.B. 834, 838 n.4 (1965). See also *Yorke* v. *NLRB*, 709 F.2d 1138 (7th Cir. 1983) (upholding the NLRB's requirement that a bankruptcy trustee engage in effects bargaining before liquidating an insolvent business), cert. denied, 465 U.S. 1023 (1984); *NLRB* v. *Transmarine Navigation Corp.*, 380 F.2d 933 (9th Cir. 1967) (upholding the NLRB's requirement that a company that has decided to terminate and relocate its operations in a joint venture engage in effects bargaining).

"major" dispute insofar as they are proffered for the purpose of changing an existing agreement. See pages 4-5, *supra*. Nevertheless, the railroad's statutory duty to bargain must be read in light of the railroad's right to terminate its business. As this Court recognized in *Darlington*, an employer has a virtually absolute right to go out of business as long as he complies with the obligations set forth in his existing collective bargaining agreement, which sets forth the "rates of pay, rules, and working conditions" (see 45 U.S.C. 152 First) for his employees. His employees are not entitled to use the bargaining process to thwart that right. It follows that while a railroad does have a duty to discuss employee proposals concerning the effects of the business closure—such as termination and job security arrangements, including severance pay and, in appropriate cases, successor employment or reemployment upon reopening—the railroad is under no duty to bargain over proposals that would prevent it from effectuating its decision to close.[19]

By the same token, RLA bargaining concerning the effects of a business closure should not result in the "virtually endless" bargaining and mediation process (*Burlington N.R.R.*, 481 U.S.

[19] Thus, the First Circuit has held, in a case involving a merger of two airlines, that "[w]here it is clear, as in the case of a merger, that bargaining about some effects of the decision would be ineffective unless the company could be required to renegotiate the merger, we believe that the duty to bargain about those effects does not arise at all." *International Ass'n of Machinists* v. *Northeast Airlines, Inc.*, 473 F.2d 549, 558-559 (1st Cir.), cert. denied, 409 U.S. 845 (1972).

at 444) that occurs in the case of renewal or revision of a collective bargaining agreement between an ongoing railroad and its employees.[20] The matters at issue when an railroad elects to close are generally discrete, limited, and relatively uncomplicated.[21] Indeed, interminable effects bargaining after a railroad has closed not only would infringe the railroad's right to go out of business, it would not further the basic purpose of the RLA – to avert work stoppages that would interrupt the flow of interstate commerce.[22] Thus, a railroad's duty to bargain over

[20] In *First Nat'l Maintenance Corp.*, the Court stated that "bargaining over the effects of a decision must be conducted in a meaningful manner and at a meaningful time" (452 U.S. at 682). The scope of effects bargaining under the NLRA is determined in light of the scheme of that statute, which requires only that the parties bargain in good faith to impasse before they are free to act unilaterally (*id.* at 687 n.17). The scope of RLA bargaining must be determined in light of the RLA's statutory scheme. See note 15, *supra*. Furthermore, we think that the ICA's provisions for labor protection are highly relevant in this context. Such protection, where available, may diminish the need for effects bargaining.

[21] In assessing an employer's fulfillment of his obligation to bargain in good faith, account must be given to the employer's financial condition and his right to liquidate his business in an expeditious manner. For example, if the employer is insolvent, he may be constrained, both as a matter of his actual financial resources and by statutes prohibiting an insolvent from granting creditor preferences, from honoring requests for additional severance payments.

[22] See *Burlington N.R.R.*, 481 U.S. at 450-452; *Detroit & T.S.L.R.R.*, 396 U.S. at 150; *Brotherhood of Ry. & S.S. Clerks* v. *Florida East Coast R.R.*, 384 U.S. 238, 246 (1966). This goal, which reflects the public's interest in uninterrupted rail traffic, obviously has little or no relevance once the rail carrier discontinues its operations. Indeed, the bargaining process itself becomes unproductive at that point. Generally speaking, the source of an employer's bargaining power is its ability to pay for work performed, and the source of a union's bargaining power is the value of its members' services. In the case of an ongoing business, an employer may be willing to make concessions concerning job security or severance pay in return for reduced wages. The employer's concessions are, in effect, alternative compensation for work that the employees will perform under the contract. But in the case of a closing business, the employer has no need for continued services and no comparable incentive to make concessions. And the union, which under *Darlington* has no power to thwart the employer's exercise of his right to go out of business, has little or no leverage with which to exact concessions in return. In these circumstances, further effects bargaining quickly becomes an exercise in futility.

effects generally should come to an end once it has fulfilled its existing contractual obligations and has discontinued its operations.[23]

We accordingly submit that the court of appeals did not err to the extent that it required P&LE to engage in the type of limited effects bargaining that we have described. We do submit, however, that the court of appeals erred in interpreting the RLA's status quo obligations. The court of appeals broadly held that if a rail labor union serves a Section 6 notice that proposes changes in a collective bargaining agreement, Section 6's status quo requirements prohibit the railroad from taking actions adverse to labor even though such actions would be permissible or authorized under the existing employer-employee relationship. See 87-1888 Pet. 17a-18a. That ruling is not required by the RLA's language or objectives, nor is it compelled by this Court's precedents.

As previously discussed, the RLA is concerned with formation and maintenance of "agreements concerning rates of pay, rules, and working conditions" (45 U.S.C. 152 First). Section 6 accordingly requires a railroad to bargain with a union concerning any proposed change in agreements affecting those three mandatory subjects of bargaining, and it further provides that the railroad must continue to honor its extant obligations with respect to those subjects during the bargaining process (45 U.S.C. 156). But while Section 6 instructs the railroad to pre-

[23] Congress recently enacted the Worker Adjustment and Retraining Notification Act, Pub. L. No. 100-379, 102 Stat. 890 (1988), which generally requires employers (including rail carriers) of 100 or more employees to give their employees 60 days' advance notice of partial or complete closures. This statute provides covered employees (who have not made other arrangements in their collective agreements) with an opportunity for limited effects bargaining over announced closures. Of course, employees need not wait until the notice of closing (when they in turn have little bargaining power, see note 22, *supra*) to offer proposals concerning job security. Indeed, collective bargaining agreements frequently address such questions. See *Order of R.R. Telegraphers* v. *Chicago & N.W. Ry.*, 362 U.S. 330, 336 (1960).

serve the "rates of pay, rules, or working conditions" (45 U.S.C. 156), it does not prevent the railroad from taking actions affecting its employees that are *authorized* either under the existing collective bargaining agreement or through the implicit understanding of the parties as reflected in established work practices.[24]

This result is not only consistent with Section 6's language, it is consistent with the RLA's fundamental objective of utilizing collective bargaining to settle disputes and to avoid interruptions of interstate commerce. See 45 U.S.C. 151a, 152. The stability of rail commerce is best served by agreements that specify in advance the rights of management and labor in the face of future contingencies. Congress certainly intended that the RLA would encourage, rather than impede, the formation of such accords. But the creation of those agreements would be pointless and the goal of commercial stability would be severely undermined if, once the contingency occurred, either party could suspend the agreement by simply filing a Section 6 notice proposing to amend the accord.

[24] Sections 5 and 10 of the RLA (45 U.S.C. 155, 160) contain similar provisions requiring the parties to maintain the status quo during subsequent steps of the bargaining process. Section 5 First provides that if the National Mediation Board's conciliation efforts fail, and the parties reject the Board's suggestion of arbitration, then for the next 30 days "no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose" (45 U.S.C. 155 First). Section 10, which governs the President's creation of an emergency board to report on labor disputes that threaten "to deprive any section of the country of essential transportation service" (45 U.S.C. 160), provides that "[a]fter the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose" (45 U.S.C. 160). As this Court has stated, while the "language of §§ 5, 6, and 10 is not identical in each case, we believe that these provisions, together with § 2 First [setting forth the duty to bargain] form an integrated, harmonious scheme for preserving the status quo from the beginning of the major dispute through the final 30-day 'cooling-off' period. Although these provisions are applicable to different stages of the Act's procedures, the intent and effect of each is identical so far as defining and preserving the status quo is concerned." *Detroit & T.S.L.R.R.*, 396 U.S. 142, 152 (1969) (footnote omitted).

Applying these principles to the present case, we believe that RLEA's filing of a Section 6 notice should not prevent P&LE from undertaking management initiatives that will reduce its work force, provided that those actions are taken in accordance with the railroad's present obligations to its employees as set forth in the existing agreements and understandings between the parties. The court of appeals rested its contrary conclusion on the belief that P&LE's proposed sale necessarily "would require a 'change in agreements affecting rates of pay, rules, or working conditions' " (87-1888 Pet. App. 17a) or would "*change* the nature of those agreements" (*id.* at 18a (emphasis in original)). But the court's factual premise is not well founded.

This Court has recognized that job security is a working condition that is subject to RLA collective bargaining. See *Order of R.R. Telegraphers* v. *Chicago & N.W. Ry.*, 362 U.S. 330, 332-338 (1960). As a result, collective bargaining agreements frequently address job security matters. Indeed, "in the collective bargaining world today, there is nothing strange about agreements that affect the permanency of employment." *Id.* at 336. Agreements commonly state, or by their terms indicate, that an employer may make reductions in his work force or go out of business completely, and they often include job security provisions—including severance pay and reassignment opportunities—when the employer exercises that right. See, *e.g.*, *Chicago & N.W. Transp. Co.* v. *Railway Labor Executives' Ass'n*, 855 F.2d 1277, 1284-1285 (7th Cir. 1988) (holding that labor force reductions were arguably comprehended within and potentially amenable to resolution by reference to the existing collective bargaining agreement), cert. denied, No. 88-464 (Nov. 28, 1988). Thus, the court of appeals' assumption that a railroad's decision to terminate its operations necessarily would require a change in its existing collective bargaining agreements is not accurate. Indeed, it would be anomalous to prohibit a railroad from employing collectively bargained job termination provisions exactly when those provisions should come into play.

The court of appeals further erred in concluding (87-1888 Pet. App. 17a) that this Court's decision in *Detroit & T.S.L. R.R.* v. *United Transp. Union* (*Shore Line*), 396 U.S. 142

(1969), which stated that Section 6 requires the parties to preserve "actual, objective working conditions" (*id.* at 153) during the course of collective bargaining, requires that a closing railroad must always preserve its employees' jobs during the bargaining process. Although *Shore Line* may seem to support that result on a superficial reading, a careful examination of the opinion indicates that a railroad may make adjustments in its work force, even while it is engaged in collective bargaining, provided that either the collective bargaining agreement authorizes, or the actual work practices, allow for such adjustments. Thus, *Shore Line* holds that the existing collective bargaining agreement terms *and* (where the agreement is silent) the on-the-job practices define the "actual, objective working conditions." It follows that if the agreement or actual practices permit the employer to make unilateral work force reductions, that "working condition" is a part of the status quo.

In *Shore Line,* a railroad announced its intention to create "outlying" work assignments. Previously, certain employees had reported to work at a central location near their homes to be transported on the railroad's time and at the railroad's expense to their work assignments. The railroad proposed a change that would require these workers to commute on their own time and at their own expense to a work location at Trenton, Michigan, some 35 miles away. See 396 U.S. at 144. The employees' union filed a Section 6 notice proposing amendments to the collective bargaining agreement "to cover the changed working conditions of the employees who would work out of Trenton" (*id.* at 145). The railroad changed its plans, the union withdrew its Section 6 notice, and it subsequently brought an action before an adjustment board (see page 5, *supra*) to determine whether the collective bargaining agreement allowed the railroad to make outlying assignments (396 U.S. at 145). The adjustment board found that there was " 'nothing in the rules of [the collective bargaining] agreement which precludes this carrier from establishing an outside assignment' " (*id.* at 146 n.9). The railroad reinitiated its outlying assignments proposal, and the union filed a new Section 6 notice, this time expressly seeking "to amend the agreement to forbid the railroad from making any outlying assign-

ments at all" (*id.* at 146). The union threatened to strike, the railroad sought an injunction, and the union counterclaimed, arguing that the Section 6 status quo requirement forbade the railroad from establishing the outlying assignments while bargaining was taking place (*id.* at 146-147).

When the case reached this Court, the railroad argued that the status quo consists "*only* of the working conditions specifically covered in the parties' existing collective-bargaining agreement" (396 U.S. at 143 (emphasis added)) while the union argued that the status quo consists of the "actual objective working conditions out of which the dispute arose, *irrespective* of whether these conditions are covered in an existing collective agreement" (*ibid.* (emphasis added)). This Court agreed with the union (*id.* at 143), stating that the parties are obligated to:

> preserve and maintain unchanged those actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute.

Id. at 153 (footnote omitted). Thus, the Court did not hold that the employer must preserve jobs; it held, in accordance with Section 6's plain language, that the employer must preserve "working conditions" (45 U.S.C. 156). And the Court did not hold that a collective bargaining agreement, which by definition represents the parties' "agreement[ ] concerning rates of pay, rules, and working conditions" (45 U.S.C. 152 First), is not the primary source for determining what "working conditions" Section 6 preserves. The Court held only that relevant working conditions "need not be covered in an existing agreement" to qualify as part of the "actual, objective working conditions" that define the status quo. 396 U.S. at 153.[25]

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[25] The Court's application of its reasoning to the facts before it aptly illustrates the principle. The Court recognized that a collective bargaining agreement could authorize outlying assignments. See 396 U.S. at 153-154. Furthermore, it stated that the railroad would not have been barred from imposing outlying assignments, even in the face of a Section 6 notice, "if, apart from the agreement, such assignments had occurred for a sufficient period of time with the knowledge and acquiescence of the employees to become in reality a

Accordingly, *Shore Line* properly recognizes that an employer-employee relationship rests *not only* on the collective bargaining agreement but also on the implicit understandings of the parties.[26] It follows that if either a collective bargaining agreement or on-the-job practices authorize the employer to reduce or eliminate his work force in accordance with specified terms and conditions, that is one of the "working conditions" that defines the status quo.

Section 6's language, the reasonable implications drawn from the RLA's structure and purpose, and this Court's *Shore Line* decision are therefore consistent in recognizing that the filing of a Section 6 notice does not necessarily require the employer to preserve "the very existence of the worker's jobs" (87-1888 Pet. App. 18a). Instead, it requires the parties to preserve the "working conditions" set forth in the collective bargaining agreement or grounded in implicit understandings based on past employment practice. The working conditions derived from these sources, in turn, may permit the employer to take unilateral actions, including reductions in force, with respect to his employees. The court of appeals accordingly erred in holding that the employer is absolutely precluded from taking such action during the course of effects bargaining.

The collective bargaining agreements between P&LE and its various unions are not a part of the record in this case. It therefore is necessary to remand this case to the district court for

part of the actual working conditions" (*id.* at 154). But the agreement in that case was silent with respect to outlying assignments, and the railroad's established practice, which grew up in the face of the agreement's silence, was for employees to report to work at a central location (*ibid.*). The Court accordingly concluded that defining the status quo solely by reference to the agreement would be untenable because it would allow a rail carrier to take unfair "advantage of the agreement's silence" (*id.* at 155) where in fact a working condition had become established through practice or custom.

[26] "It would be virtually impossible to include all working conditions in a collective-bargaining agreement. Where a condition is satisfactorily tolerable to both sides, it is often omitted from the agreement, and it has been suggested [by the RLEA] that this practice is more frequent in the railroad industry than in most others" (396 U.S. at 154-155 (footnote omitted)). See also *id.* at 159-161 (Harlan, J., concurring in part and dissenting in part).

further proceedings. If the parties agree that the collective bargaining agreements (or the parties' implicit understandings) establish their respective rights in the present circumstances, then the agreement or other understandings will likewise establish the status quo.[27] In the more likely event that the parties disagree about their respective rights, the disagreement is subject to resolution — as in the case of all other disputes that relate "to the meaning or proper application of a particular [contract] provision with reference to a specific situation or to an omitted case" (*Elgin*, 325 U.S. at 723) — through the "minor" dispute provisions of the RLA. See *Andrews* v. *Louisville & N.R.R.*, 406 U.S. 320, 324 (1972).[28]

In sum, we submit that P&LE has a limited duty to bargain with its unions over the effects of its decision to sell its assets, but it is not obligated to bargain over proposals that would prevent the railroad from effectuating its decision. P&LE must maintain the status quo during the bargaining process. The status quo is defined, however, by the terms of the existing collective bargaining agreements and the implicit understandings of the parties. Any disagreements among the parties concerning those matters are subject to resolution in accordance with the RLA's "minor" dispute mechanisms.

[27] Where a collective bargaining agreement is silent on a given matter, the implicit understandings of the parties may derive from the common law rules that, in the absence of an express agreement, would determine the employment relationship. Thus, if the agreement is silent with respect to continued employment, the rights of the parties may be governed by the "the traditional common-law rule that a contract of employment is terminable by either party at will." *Andrews* v. *Louisville & N.R.R.*, 406 U.S. 320, 324 (1972).

[28] It is well settled that "if the subject matter of the parties' dispute is 'arguably comprehended' within, and potentially amenable to resolution by reference to, their existing collective bargaining agreements and the attendant established past practices" the matter constitutes a minor dispute that is subject to mandatory arbitration by the National Railroad Adjustment Board (NRAB) or by its statutory alternatives pursuant to 45 U.S.C. 153 First, Second. *E.g.*, *Chicago and N.W. Transp. Co.* v. *Railway Labor Executives' Ass'n*, 855 F.2d 1277, 1284 (7th Cir. 1988), cert. denied, No. 88-464 (Nov. 28, 1988). Our brief amicus curiae in *Consolidated Rail Corp.* v. *Railway Labor Executives' Ass'n*, No. 88-1, provides a detailed discussion (at 10-20) of the minor dispute resolution mechanism.

III. A Proper Interpretation of the Railway Labor Act's Status Quo Obligation Eliminates The Prospect Of An "Erosive" Taking In Violation of the Fifth Amendment

P&LE contends that the court of appeals' interpretation of the RLA's Section 6 status quo obligation, which requires the railroad to continue operations against its will at a financial loss, would violate the Takings Clause of the Fifth Amendment. See 87-1888 Pet. 26-27. P&LE bases its argument on the principle, recognized by this Court, that federal legislation requiring an insolvent railroad to continue public service at a loss pending reorganization efforts may result in an "erosive" taking if the railroad is forced to continue "compelled loss" operations beyond a reasonable time. See *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 122-136 (1974).

P&LE first raised this argument in the court of appeals and, as a result, it has not developed the factual record that normally is necessary to assess whether a statute actually results in a violation of the Fifth Amendment's proscription of uncompensated takings. See, *e.g., Penn Central Transp. Co.* v. *New York City,* 438 U.S. 104, 124 (1978) ("whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case' "). We accordingly submit that any question of an erosive taking cannot be resolved here. We note, however, that if P&LE is correct that an erosive taking can arise in this context, then the RLA's status quo obligations should be construed to avoid that possibility. See, *e.g., Regional Rail Cases,* 419 U.S. at 134 (" 'construction should go in the direction of constitutional policy' ") (quoting *United States* v. *Johnson,* 323 U.S. 273, 276 (1944)). Our construction of the RLA status quo obligation is not only the most reasonable interpretation of the statutory language, it also eliminates any prospect of a Fifth Amendment violation. Obviously, the railroad can suffer no erosive taking if its obligation to remain in business results from consensual commitments set forth in its collective bargaining agreements or arises from its implicit understandings with its employees.

CONCLUSION

The judgment of the court of appeals in No. 87-1589 should be affirmed, and the judgment of the court of appeals in No. 87-1888 should be affirmed in part, reversed in part, and remanded for further proceedings.

Respectfully submitted.

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JANUARY 1989

ADDENDUM

The ICA sets forth the following national rail transportation policy (49 U.S.C. 10101a):

§ **10101a.** ***Rail transportation policy.***

In regulating the railroad industry, it is the policy of the United States Government—

(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;

(2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;

(3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Interstate Commerce Commission;

(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;

(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;

(6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;

(7) to reduce regulatory barriers to entry into and exit from the industry;

(8) to operate transportation facilities and equipment without detriment to the public health and safety;

(9) to cooperate with the States on transportation matters to assure that intrastate regulatory jurisdiction is exercised in accordance with the standards established in this subtitle;

(10) to encourage honest and efficient management of railroads and, in particular, the elimination of noncompensatory rates for rail transportation;

(11) to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability;

(12) to encourage fair wages and safe and suitable working conditions in the railroad industry;

(13) to prohibit predatory pricing and practices, to avoid undue concentrations of market power and to prohibit unlawful discrimination;

(14) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information; and

(15) to encourage and promote energy conservation.

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